A

SANG LEE COMPANY SDN BHD & ORS

v.

MUNUSAMY KARUPPIAH

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(i)-16-2009(W)]

C

29 APRIL 2010

CIVIL PROCEDURE: *Judgments and orders - Amendment order - Rules of the High Court 1980, O. 42 r. 8 - Whether complied with - Whether Deputy Registrar had power to grant order extending terms of an*

D *earlier order without following procedure prescribed*

CIVIL PROCEDURE: *Judgments and orders - Sealed Order - Amendment of - Failure to express true intention of the court - Application made to correct errors so that order truly reflected what was pronounced by court - Whether Court of Appeal erred when setting aside order for*

E *amendment - Whether right and proper for sealed order to be amended accordingly - Rules of the High Court 1980, O. 20 r. 11*

The plaintiff was granted an *ad interim* by the Judicial Commissioner ('JC1') pending disposal of his application for injunction against the

F defendants. Upon receipt of the draft *ad interim* order, the defendants contended that what the plaintiff had drafted was different from what was pronounced by the court and immediately informed the plaintiffs' counsel of their objections and simultaneously wrote a letter to the Deputy Registrar with a copy to the judge's

G secretary of the dispute as to the terms of the draft *ad interim* order. However, there was no response as to the status of the draft order and the appointment with the deputy registrar or the judge from the court. Subsequently, the plaintiff served the defendants with a purported perfected sealed *ad interim* order ('the Sealed Order')

H which bore no resemblance with the actual *ad interim* order pronounced by the High Court judge on 27 June 2006. The defendants thereafter applied to the High Court to amend the terms of the Sealed Order ('encl. 45'). Judicial Commissioner ('JC2') granted the defendants' application to amend the Sealed Order so

I that the corrected order truly reflected what was actually pronounced by JC1 on 27 June 2006. The plaintiff appealed to the Court of Appeal against the decision of the High Court (JC2) dated 23 May

2007 in allowing the amendment of the Sealed Order. The Court of Appeal allowed the plaintiff's appeal and reversed the decision of the High Court judge and reinstated the Sealed Order which was perfected and sealed by the Deputy Registrar. The defendants obtained leave of the Federal Court to appeal against the decision of the Court of Appeal. The issue that arose was whether the High Court had power to grant an order extending the terms of an earlier order without following the procedures prescribed by O. 42 r. 8 of the Rules of the High Court 1980.

Held (allowing the appeal)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) The Court of Appeal had erred, in law and in fact, in failing to consider that O. 42 r. 8 of the Rules of the High Court 1980 was never complied with in the present case which resulted in the error on the face of the record. Under O. 42 r. 8 of the Rules of the High Court 1980, if there was a dispute on the matter, any party may seek an appointment with the Registrar to settle the terms and if the matter was heard by the judge the dispute may be determined by the judge. This was to safeguard the sanctity and authenticity of the final perfected sealed order and the court records. It was also to ensure that it accurately captured the very essence and terms of the order pronounced by the High Court. This was exactly what the defendants had done in this case. The Deputy Registrar in the present case had no power to grant an order extending the terms of an earlier order pronounced by JC1 without following the procedure prescribed by O. 42 r. 8 of the Rules of the High Court 1980. (paras 3, 5 & 11)

(2) The Court of Appeal failed to consider that there was nothing in the court records to indicate that the Deputy Registrar had ever referred the matter to the High Court judge before perfecting the order. Hence it was wrong for the Court of Appeal to assume that the Sealed Order was accurate and that it emanated from the High Court. This was contrary to the finding of fact made by the High Court on 23 May 2007 wherein JC2 had granted the defendants' application in encl. 45 to amend the Sealed Order so that the corrected order truly reflected what was actually pronounced by JC1 on 27 June 2006. (para 6)

(3) The application made by the defendants in encl. 45 to amend the terms of the Sealed Order was not intended to alter, vary or set aside a perfected order but to correct the errors in the said order drawn up by the plaintiff's solicitors which had failed to express the true intention of the court. The Court of Appeal should not have set aside the order for amendment made by the High Court on 23 May 2007 as the purpose and intention for the amendment was merely to set the court records straight and to ensure that the actual terms pronounced by the High Court on 27 June 2006 had been properly authenticated and recorded. It was only right and proper that the Sealed Order be amended accordingly pursuant to O. 20 r. 11 of the RHC 1980. In law, the court can always amend an order which does not reflect what was actually pronounced. In such a situation, the court was not *functus officio*. (paras 7, 8 & 9)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif diberi *ad interim* oleh Pesuruhjaya Kehakiman ('PK1') sementara menunggu pelupusan permohonan injunksi terhadap defendan-defendan. Atas penerimaan perintah deraf *ad interim*, defendan menegaskan bahawa apa yang telah diderafkan oleh plaintif adalah berbeza dari apa yang telah diumumkan di mahkamah dan seterusnya memberitahu peguam plaintif bantahan-bantahan mereka dan pada masa yang sama menulis surat ke timbalan pendaftar dengan salinan dihantar ke setiausaha hakim mengenai pertikaian syarat-syarat perintah deraf *ad interim*. Walaubagaimanapun, defendan-defendan tidak mendapat jawapan mengenai status perintah deraf dan apa-apa temujanji dengan timbalan pendaftar atau dengan hakim mahkamah. Kemudiannya, plaintif menyampaikan ke atas defendan-defendan dengan perintah *ad interim* dimeterai yang kononnya sempurna ('perintah yang dimeterai') yang tidak mempunyai persamaan dengan perintah *ad interim* yang diumumkan oleh Mahkamah Tinggi pada 27 Jun 2006. Defendan-defendan memohon ke Mahkamah Tinggi untuk pindaan terma-terma perintah dimeterai (lampiran 45). Pesuruhjaya Kehakiman ('PK2') membenarkan permohonan defendan-defendan untuk membuat pindaan ke perintah yang dimeterai supaya perintah tersebut boleh diperbetulkan dan melambangkan apa yang sebenarnya diumumkan oleh PK1 pada 27 Jun 2006. Plaintif membuat rayuan ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi (PK2) yang bertarikh 23 Mei 2007 dalam membenarkan pindaan perintah yang dimeterai tersebut. Mahkamah Rayuan membenarkan rayuan plaintif dan

menterbalikkan keputusan Hakim Mahkamah Tinggi dan mengembalikan semula perintah yang dimeterai yang telah disempurnakan dan dimeterai oleh timbalan pendaftar. Defendan-defendan memperolehi kebenaran Mahkamah Persekutuan untuk merayu terhadap keputusan Mahkamah Rayuan. Isu yang dibangkitkan adalah sama ada Mahkamah Tinggi mempunyai kuasa untuk membuat perintah memperluaskan terma-terma perintah terdahulu tanpa mengikut prosedur-prosedur yang disediakan oleh A. 42 k. 8 Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan (membenarkan rayuan)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan telah khilaf, dari segi undang-undang dan fakta, kerana gagal mempertimbangkan ketidakpatuhan A. 42 k. 8 Kaedah-Kaedah Mahkamah Tinggi 1980 di dalam kes ini yang mengakibatkan kesalahan atas muka rekod. Di bawah A. 42 k. 8 Kaedah-Kaedah Mahkamah Tinggi 1980, jikalau timbul pertikaian mengenai halperkara, pihak-pihak terlibat boleh cuba memperolehi temujanji dengan pendaftar untuk menyelesaikan terma-terma dan jika halperkara dibawa ke hadapan hakim pertikaian boleh ditentukan oleh hakim. Ini adalah untuk mempertahankan kesucian dan kesahihan kemuktamadan dan penyempurnaan perintah yang dimeterai dan rekod-rekod mahkamah. Ia juga untuk memastikan yang ia telah dengan tepatnya menangkap intipati dan terma-terma perintah yang diumumkan oleh Mahkamah Tinggi. Ini telah dilakukan oleh defendan-defendan di dalam kes ini. Timbalan pendaftar di dalam kes ini tidak mempunyai kuasa untuk membuat perintah memperluaskan terma-terma perintah terdahulu yang diumumkan PK1 tanpa mematuhi prosedur-prosedur yang diberikan oleh A. 42 k. 8 Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Mahkamah Rayuan gagal mempertimbangkan bahawa tidak terdapat di dalam rekod-rekod mahkamah yang menunjukkan timbalan pendaftar telah merujuk halperkara ke Hakim Mahkamah Tinggi sebelum menyempurnakan perintah. Oleh itu, ia adalah salah untuk Mahkamah Rayuan menganggap bahawa perintah yang dimeterai adalah tepat dan datangnya daripada Mahkamah Tinggi. Ini bertentangan dengan penemuan fakta yang telah dibuat oleh Mahkamah Tinggi pada 23 Mei 2009 di mana PK2 telah membenarkan permohonan defendan-

defendan dalam lampiran 45 untuk meminda perintah yang dimeterai supaya perintah yang diperbetulkan sememangnya melambangkan apa yang telah diumumkan oleh PK1 pada 27 Jun 2006.

(3) Permohonan yang dibuat dalam lampiran 45 untuk meminda terma-terma perintah yang dimeterai bukan ditujukan untuk mengubah atau mengenepikan perintah yang disempurnakan tetapi untuk memperbetulkan kesalahan-kesalahan di dalam perintah tersebut yang disediakan oleh peguam plaintif yang gagal menunjukkan tujuan sebenar mahkamah. Mahkamah Rayuan tidak sepatutnya mengenepikan perintah untuk pindaan yang diputuskan oleh Mahkamah Tinggi pada 23 Mei 2007 kerana niat dan tujuan untuk pindaan adalah untuk memperbetulkan rekod-rekod mahkamah dan untuk memastikan terma-terma yang sebenarnya diumumkan oleh Mahkamah Tinggi pada 27 Jun 2006 telah dengan cermat dan teratur disahkan dan direkodkan. Ia adalah sesuai dan wajar bahawa perintah yang dimeterai dipinda seharusnya di bawah A. 20 k. 11 Kaedah-Kaedah Mahkamah Tinggi 1980. Dalam undang-undang, mahkamah boleh meminda perintah yang tidak melambangkan apa yang telah diumumkan. Di dalam situasi seperti itu, mahkamah bukan *functus officio*.

Case(s) referred to:

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Re Cripps ex parte Muldoon & Others [1984] 2 All ER 705 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 11, O. 42 r. 8

For the appellants - Chan Vy Sing (Lam Cheng Wun with him) M/s Lee & May

For the respondent - Vinod Kamalanathan; M/s Vinod Kamalanathan & Assocs

[Appeal from Court of Appeal; Civil Appeal No: W-02-504-2007]

[Editor's note: For the Court of Appeal judgment, please see Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924.]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal which allowed the respondent's appeal against the decision of the High Court at Kuala Lumpur dated 23 May 2007. Before the High Court, the appellants were the defendants and the respondent was the plaintiff. We shall refer to the parties as they were before the High Court. We heard this appeal on 22 February 2010 wherein we had allowed this appeal by the defendants. We now give our reasons in arriving at our decision.

Background Facts

[2] The relevant background facts leading to the present appeal by the defendants may be summarized as follows:

(a) On 11 May 2006 the plaintiff filed a writ of summons and statement of claim against the defendants for alleged breach of contract.

(b) The defendants filed a statement of defence and a counter claim dated 12 June 2006 against the plaintiff alleging *inter alia*, that the documents and purported contract relied on by the plaintiff were forged documents and that the plaintiff has also trespassed on the land owned by the first defendant.

(c) The plaintiff then filed an *inter partes* application dated 11 May 2006 for an interlocutory injunction against the defendants for an order that the defendants, be restrained from taking any steps in any form or manner whatsoever whether in their own capacity or officers and/or agents from entering into any contract and/or allowing any person other than the plaintiff to cut and/or tap and/or dispose of all trees on the land belonging to the first defendant ("encl. 3").

(d) Enclosure 3 was scheduled to be heard on 27 June 2006. In the meantime, there were exchanges of affidavits between both parties.

(e) On the first hearing date of encl. 3 on 27 June 2006 the matter came before the learned Judicial Commissioner Noor Azian bt. Shaari ("JC1") of the Kuala Lumpur High Court

Civil Division No. 7 ("High Court Civil 7"). The defendants' counsel informed the court that they were ready to proceed. However, the plaintiff's counsel informed the court that they still wanted to reply further to the defendants' affidavits and applied for adjournment. The court then granted the plaintiff time to reply and fixed encl. 3 for hearing on 26 July 2006.

(f) After the court had granted the plaintiff's request for adjournment, the plaintiff orally requested for an *ad interim* injunction to preserve the *status quo* pending the hearing of encl. 3. The plaintiff gave an undertaking as to damages. This oral application for *ad interim* injunction was objected to by the defendants.

(g) After hearing the parties, the court granted an *ad interim* injunction pending the disposal of encl. 3 to preserve the *status quo*, on the following terms:

> Nothing to be done on the related land until Enclosure 3 is disposed and subject to the undertaking as to damages.

(h) The plaintiff prepared the draft order as if the court had already made a decision on encl. 3 (which was adjourned) instead of an *ad interim* order to maintain *status quo* only. The defendants contended that what the plaintiff had drafted was totally different from what was pronounced by the court on 27 June 2006.

(i) Upon receipt of the draft *ad interim* order, the defendants' counsel immediately informed the plaintiff's counsel on the same day of their objections and simultaneously wrote a letter to the Deputy Registrar with a copy to the judge's secretary of the dispute as to the terms of the draft *ad interim* order dated 27 June 2006. In that same letter the defendants' counsel sought an appointment with the Deputy Registrar or with the judge pursuant to O. 42 r. 8, Rules of the High Court 1980 ("RHC 1980") to sort out the terms of the *ad interim* order dated 27 June 2006.

(j) Despite requests for free dates, the plaintiff's counsel did not supply any free date to the defendants for the purposes of the appointment pursuant to O. 42 r. 8 of the RHC 1980. There was also no response as to the status of the draft Order and the appointment with the Deputy Registrar or the judge from the court.

(k) On 28 July 2006, the plaintiff's counsel served the defendants' counsel with a purported perfected sealed *ad interim* Order dated 27 June 2006 ("the sealed order") which bears no semblance with the actual *ad interim* order pronounced by the High Court judge on 27 June 2006.

(l) The defendants thereafter applied to the High Court to amend the terms of the sealed order ("encl. 45").

(m) Pending the hearing of application to amend the sealed order, the plaintiff's application for interim injunction proper in encl. 3 was dismissed with costs on 7 September 2006. However, despite the dismissal of encl. 3, the plaintiff continued with committal proceedings against the defendants based on the sealed order dated 27 June 2006.

(n) When the application to amend encl. 45 came up for hearing, another learned Judicial Commissioner Tengku Maimun binti Tuan Mat ("JC2") had been appointed to preside in the High Court Civil 7. The then learned JC2 after going through the entire Court records and considering the matter at length, on 23 May 2007 granted the defendants' application to amend the sealed order so that the corrected order truly reflects what was actually pronounced by the learned JC1 on 27 June 2006.

(o) The plaintiff appealed to the Court of Appeal against the decision of the High Court (JC2) dated 23 May 2007 in allowing the amendment of the sealed order. The Court of Appeal on 15 September 2008 allowed the plaintiff's appeal and reversed the decision of the High Court judge dated 23 May 2007. The Court of Appeal reinstated the Sealed Order which was perfected and sealed by the Deputy Registrar.

(p) The defendants obtained leave of the Federal Court to appeal against the decision of the Court of Appeal on 22 April 2009. The sole question to be addressed by this Court is as follows:

> Whether the High Court has power to grant an order extending the terms of an earlier order without following the procedures prescribed by Order 42 rule 8 of the Rules of the High Court 1980.

Decision

[3] It is our considered view that the Court of Appeal erred, in law and in fact, in failing to consider that O. 42 r. 8 of the RHC 1980 was never complied with in the present case which had resulted in the error on the face of the record. The draft *ad interim* order prepared by the plaintiff's solicitors was never approved by the defendants' solicitors. In fact the defendants' solicitors upon receipt of the draft *ad interim* order had informed the plaintiff's solicitors of their objection and had sought an appointment with the Deputy Registrar or with the judge pursuant to O. 42 r. 8 of the RHC 1980 to sort out the terms of the *ad interim* Order.

[4] Order 42 r. 8 of the RHC 1980 provides as follows:

> (1) Where a party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.
>
> (2) ...
>
> (3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.
>
> (4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.
>
> (5) ...

[5] Under O. 42 r. 8 of the RHC 1980 it is clear that if there is a dispute on the matter, any party may seek an appointment with the Registrar to settle the terms and if the matter is heard by the judge the dispute may be determined by the judge. This is to safeguard the sanctity and authenticity of the final perfected sealed order and the court records. It is also to ensure that it accurately captures the very essence and terms of the order pronounced by the High Court. This is exactly what the defendants had done in this case.

[6] It is to be noted that the Court of Appeal failed to consider that there was nothing in the court records to indicate that the Deputy Registrar had ever referred the matter to the High Court judge before perfecting the order. Hence it was wrong for the Court of Appeal to assume that the sealed order was accurate and that it emanated from the High Court. This is contrary to the finding of fact made by the High Court on 23 May 2007 wherein the learned JC2 granted the defendants' application in encl. 45 to amend the sealed order so that the corrected order truly reflects what was actually pronounced by the learned JC1 on 27 June 2006.

[7] We are of the view that the application made by the defendants in encl. 45 to amend the terms of the sealed order was not intended to alter, vary or set aside a perfected order but to correct the errors in the said order drawn up by the plaintiff's solicitors which had failed to express the true intention of the court in granting an interim injunction restraining any party to deal with the subject land until the disposal of encl. 3. It is to be noted that the court had not granted any order as per the application in encl. 3 but the order that was drawn up by the plaintiff's solicitors was in the form of encl. 3 which had not yet been heard and determined by the court. The learned JC2 had made a finding that the sealed order that was drawn up by the plaintiff was clearly not in accord with the minutes in the court file and thus there occurred an error. Accordingly, it is our judgment that the learned JC2 was right in allowing the defendants' application in encl. 45.

[8] A related issue which is raised in this appeal is the question of whether the court is *functus officio* when it purports to rectify and amend the sealed order to reflect what was actually pronounced. We are of the view in the light of a clear difference and discrepancy between the terms of the sealed order as compared with the actual order pronounced by the learned JC1 on 27 June 2006, it was only right and proper that the sealed order be amended accordingly pursuant to O. 20 r. 11 of the RHC 1980. Order 20 r. 11 of the RHC 1980 provides as follows:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

[9] The application to amend was filed as in encl. 45 and the learned JC2 on 23 May 2007 after considering the entire matter and hearing both parties had correctly granted an order in terms of

encl. 45 to amend the terms of the sealed order. The Court of Appeal should not have set aside the order for amendment made by the High Court on 23 May 2007 as the purpose and intention for the amendment is merely to set the court records straight and to ensure that the actual terms pronounced by the High Court on 27 June 2006 have been properly authenticated and recorded. In law, the court can always amend an order which does not reflect what was actually pronounced. In such a situation the court is therefore not *functus officio*. (See the case of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92).

[10] We also find that the learned JC2 who amended the sealed order on 23 May 2007 had acted within the powers generally exercised by a judge of the High Court notwithstanding that she was not the trial judge who granted the *ad interim* order dated 27 June 2006. The learned JC2 had acted properly to put the court's records right. On this point we would like to refer to the case of *Re Cripps ex parte Muldoon & Others* [1984] 1989 2 All ER 705 wherein the English Court of Appeal held as follows:

> The power to amend under the slip rule contained in RSC Order 20 rule 11 was not a power granted to the particular trial judge, but was one of the powers of the court generally, exercisable by a judge of the court, who may or may not have been the trial judge.

Conclusion

[11] It is our judgment that the Deputy Registrar in the present case has no power to grant an order extending the terms of an earlier order pronounced by the learned JC1 without following the procedure prescribed by O. 42 r. 8 of the RHC 1980. For the reasons above stated we would answer the question posed in this appeal in the negative. Accordingly we allowed this appeal with costs here and the court below.